STATE OF WASHINGTON
<NAME> COUNTY SUPERIOR COURT

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO.
vs.	)	
	)	
	)	DEFENSE MEMORANDUM IN
	)	SUPPORT OF PROPOSED JURY
	)	QUESTIONNAIRE AND ORAL
	)	EXAMINATION OF JURORS
	)	
Accused.	)	
	)	

XXXXXX, a Latino male, is accused of beating and raping his ex-wife XXX in an act of domestic violence. The emotional nature of allegations involving domestic violence and sex offenses can impact potential jurors. Many individuals have strong opinions about charges of this nature. Negative attitudes about sex offenses and sex offenders are so pervasive in our society that they even extend to judicial officers who are trained to set aside personal bias. Nhan et al., "More Dangerous than Hitmen": Judicial Perceptions of Sexual Offenders, International Journal of Criminology and Sociological Theory, Vol. 5, No.1, June 2012, 823-

836. As such, eliciting potential juror's attitudes about race, domestic violence, sex offenses, and bias in police investigations through a questionnaire and thorough oral examination is vital to ensuring that Mr. X's jury is fair and impartial, free from bias or prejudice.

I. The Accused Must Receive a Fair Trial by an Impartial Jury.

Both the Due Process Clause of the Fourteenth Amendment and the Sixth Amendment right to trail mandate that an accused receive "a fair trial in a fair tribunal" before a panel of "impartial, indifferent jurors." *Groppi v. Wisconsin*, 400 U.S. 505, 507-08 (1971). This guarantee is mirrored by article 1, section 22 of the Washington State Constitution. Both the federal and state constitutions provide a right to trial by an impartial jury, which "requires a trial by an unbiased and unprejudiced jury, free of disqualifying jury misconduct." *State v. Boiko*, 138 Wn.App. 256, 260, 156 P.3d 934 (2007).

A juror should be excused for cause when his or her views "prevent **or substantially impair** the performance of his or her duties…" *State v. Brett,* 125 Wn.2d 136, 157, 892 P.2d 29 (1995). "The bias or prejudice of even a single juror is enough to violate that guarantee." *US v. Kechedzian*, 902 F.3d 1023, 1027 (9th Cir. 2018). Any doubts about bias should be resolved in favor of striking the juror. *Id*. "If confronted with a challenge for cause in which the facts do not clearly establish whether a prospective juror should be removed, the better practice will be to resolve doubt in favor of disqualification." *State v. Winbone*, 4 Wn. App. 2d 147, 169 (2018) (quoting *Arizona v. Thornton*, 187 Ariz. 325, 929 P.2d 676, 681 (1996).

Voir dire is the process by which impartial and indifferent jurors are selected. *State v. Momah*, 167 Wn. 2d 140 (2009).

> "*Voir dire* plays a critical function in assuring the criminal defendant that his [constitutional] right to an impartial jury will be honored. Without an adequate *voir dire*

> the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981) (plurality opinion). Hence, "[t]he exercise of [the trial court's] discretion, and the restriction upon inquiries at the request of counsel, [are] subject to the essential demands of fairness." *Aldridge v. United States,* 283 U.S. 308, 310 (1931)

Morgan v. Illinois, 504 U.S. 719, 730 (1992).

A proper voir dire ensures an impartial jury by allowing parties "to ascertain whether the juror has any bias, opinion, or prejudice that would affect or control the fair determination by him of the issues to be tried." *Connors v. United States*, 158 U.S. 408, 413 (1895). CrR 6.4(b) provides that:

> A voir dire examination shall be conducted for the purpose of discovering any basis for challenge for cause and for the purpose of gaining knowledge to enable an intelligent exercise of peremptory challenges. … The judge and counsel may then ask the prospective jurors questions touching their qualifications to serve as jurors in the case, subject to the supervision of the court as appropriate to the facts of the case.

The purpose of voir dire "is to enable the parties to learn the state of mind of the prospective jurors, so that they can know whether or not any of them may be subject to a challenge for cause, and determine the advisability of interposing their peremptory challenges." *State v. Laureano*, 101 Wn. 2d 745, 758, 682 P.2d 889 (1984) (quoting *State v. Tharp*, 42 Wn. 2d 494, 499-500, 256 P.2d 482 (1953)). The scope of voir dire permitted by the court should be "coextensive with this purpose." *State v. Frederiksen*, 40 Wn. App. 749, 752, 700P.2d 369 (1985). While reasonable limits on voir dire examination fall within the court's discretion, "the defendant should be permitted to examine prospective jurors carefully, 'and to an extent which will afford him every reasonable protection.'" *Id*. (citing *Laureano*, 101 Wn. 2d at 757). Thus,

questioning must be sufficiently specific to allow the parties to make informed challenges. The duration of voir dire too must be sufficient to allow the parties to uncover any hidden bias. "More important than speedy justice is the recognition that every defendant is entitled to a fair trial before 12 unprejudiced and unbiased jurors. Not only should there be a fair trial, but there should be no lingering doubt about it." *State v. Davis*, 141 Wn.2d. 798, 824–35 (2000) (quotations and citations omitted).

Here, a jury questionnaire on controversial topics that are important to discovering juror bias should be allowed. Although it may be possible to elicit the same attitudes and opinions through oral questioning, the questionnaire will make the process more efficient by allowing the parties to focus further questions on jurors based on their specific written answers. It is also more likely that a juror will respond thoughtfully and honestly when given the opportunity to do so on a questionnaire rather than being put on the spot during oral questioning, even if that oral questioning is outside the presence of the other jurors.

A. <u>Meaningful Voir Dire Requires Questions Tailored to the Specific Issues in This Case</u>

In *Morgan v. Illinois,* 504 U.S. at 734, the United States Supreme Court rejected the argument that "general fairness" and "follow the law" type questions are adequate to detect bias in prospective jurors. In *Frederiksen*, 40 Wn. App. at 754, Division I noted that three situations "require specific voir dire questions because of a real possibility of prejudice."

> (1) when the case carries **racial overtones**; (2) when the case involves other matters (*e.g.,* the insanity defense) concerning which either the local community or the population at large is commonly known to harbor strong feelings that may stop short of presumptive bias in law yet significantly skew deliberations in fact; and (3) when the case involves other forms of bias and distorting influence which have become evident through experience with juries (*e.g.,* the tendency to overvalue official government agents' testimony).

Id. (citing *United States v. Jones,* 722 F.2d 528, 529 (9th Cir. 1983), and *People v. Williams,* 29 Cal.3d 392, 174 Cal.Rptr. 317, 325, 628 P.2d 869 (1981)) (emphasis added).

The court in *Frederiksen* went on the explain that case-specific voir dire is appropriate in other scenarios that do not fall into these categories, so long as the defendant demonstrates "a reasonable possibility of prejudice, *i.e.*, that the proposed question was 'reasonably calculated to discover an actual and likely source of prejudice, rather than pursue a speculative will-o-the-wisp.' *Id.* at 756 (quoting *Jones*, 722 F.2d at 530). Such specific questioning is particularly appropriate where the issue about which counsel wishes to ask may affect a prospective juror's willingness to hold the State to its burden. *Id.* at 755.

The *Frederiksen* court's discussion makes clear that case-specific questions are often required to detect bias. Courts in other jurisdictions also have recognized that adequate voir dire requires questioning that gets into the specifics of the case. For example, in *State v. Clark*, 981 S.W.2d 143, 146-48 (Mo. 1998), the Missouri State Supreme Court reversed a conviction because defense counsel was not allowed to ask questions relating to the age of the victim. The court explained that "[v]oir dire requires the revelation of some portion of the facts of the case" and if the parties are not allowed to vior dire on "critical facts" – those facts "with substantial potential for disqualifying bias" – then it will be impossible to discover bias. *Id.* When the trial could prevent counsel from asking case-specific questions, the opportunity to voir dire prospective jurors becomes "meaningless."

In *United States v. Napoleone,* 349 F.2d 350 (3d Cir. 1965), the court reversed a conviction because the court did not permit questioning on how jurors would feel about evidence that the defendant told lies in the course of his employment as a private investigator.

The court explained

> Since the crux of the defense was that while the defendant had lied concerning the purposes of his investigation he had not presented himself as "an employee of the Veterans Administration," he had the right to have prospective jurors questions as to whether they had such a moral or ethical repugnance toward liars and lying that the could not evaluate his testimony "objectively and fairly."

People v. Coffman, 96 P.3d 30, 96 (Cal. 2004) (affirming "the principle that either party is entitled to ask prospective jurors questions that are specific enough to determine if those jurors harbor bias, as to some fact or circumstance shown by the trial evidence …").

The court in *United States v. Johnson*, 366 F. Supp. 2d 822 (N.D. Iowa 2005), a death penalty case, conducted a careful analysis of the question of whether case-specific questions are permissible during voir dire. The court noted that it is improper for parties to attempt to get jurors to speculate about how they would vote on a specific set of facts or to "precommit" to a certain verdict. However, the court concluded that "case-specific questions are appropriate – indeed, necessary – during voir dire of prospective jurors to allow the parties to determine the ability of jurors to be fair and impartial *in the case actually before them*, not merely in some 'abstract' death penalty case." *Id*. at 850 (emphasis in original).[1] The court noted that case-specific questions fall within a spectrum and divided them into five categories:

"*Abstract" questions*. Abstract questions that probe a prospective juror's beliefs without reference to specific features of the case, such as a questions about whether a juror would be able to consider evidence in a murder case impartially, are always permissible. *Id.* at 835.

[1] Other courts have adopted the reasoning from *Johnson*. *E.g., United States v. Wilson*, 493 F. Supp. 2d 402, (E.D.N.Y. 2006); *United States v. Fell*, 372 F.Supp.2d 766, (D. Vt. 2005).

Defendant's status questions. The court in *Johnson* concluded that it was appropriate to ask questions "about the defendant's status separate and independent of the alleged crime." *Id.* at 836-837. A party should always be allowed to ask questions designed to determine whether the defendant's status would be a source of bias, particularly when the defendant is the member of a protected class, as is the case with race, gender, national origin, religion etc. *See United States v. Daily*, 139 F.2d 7 (7th Cir. 1943) (noting that the trial court correctly allowed the counsel to inquire whether any prospective jurors harbored prejudice against Jehovah's Witness); *United States v. Bear Runner*, 502 F.2d 908 (8th Cir. 1974) (holding that "probing questions" were appropriate to determine bias related to defendant's status a Native American). This category of case-specific questions corresponds to the first *Frederiksen* category.

"Case-categorization" questions. The court in *Johnson* concluded that it is often appropriate to probe whether prospective jurors harbor prejudice towards certain kinds of cases. *Johnson*, 366 F. Supp. 2d at 837-40. For example, in *United States v. Flores,* 63 F.3d 1342, 1356 (5th Cir. 1996), the court held that it was appropriate for the prosecutor to have asked a prospective juror questions about whether he would be willing to impose the death penalty if he learned that the victim had been dealing drugs. *See also Green v. Johnson,* 160 F.3d 1029, 1036 (5th Cir. 1998) (prosecutor allowed to ask jurors if they could impose death penalty in felony murder case if predicate felony was unsuccessful or if defendant was an aider and abettor rather than the gunman).

This type of questioning overlaps with *Frederiksen's* second category – matters about which the community is known to harbor strong feelings – which has been interpreted to include "firearms, and underage drinking and drug use." *State v. Brady*, 116 Wn. App. 143, 148, P.3d 1258 (2003). *See also Lurding v. United States,* 179 F.2d 419 (6th Cir. 1950) (wagering);

State v. Miller, 88 P.2d 526 (1939) (intoxicants); *Webb v. Commonwealth,* 314 S.W.2d 543, 544 (Ky. 1958) ("The refusal of the right to examine the jurors on their views concerning patricide and self-defense was error.")

Case-specific questions. The court in *Johnson*, 366 F. Supp. 2d 840, 848-50, concluded that there are situations in which it is appropriate to ask questions "involving stated facts … that might actually be at issue in the case that jurors would hear." These questions may be necessary, for example, to "measure a prospective juror's ability to follow the law." *Id.* at 843. Similarly, in *Green v. Johnson*, 160 F.3d 1036-37, the court held that it was appropriate for the prosecutor to try to determine whether prospective jurors understood the difference between "deliberate" and "intentional" acts by asking a series of hypothetical questions similar to the facts of the case.

In Washington, *Frederiksen* recognized that it is appropriate to ask specific questions to probe "forms of bias and distorting influence which have become evident through experience with juries," such as juror's tendency to over- or undervalue certain kinds of evidence. *See also State v. Finch,* 746 S.W.2d 607, 613 (Mo. App. 1988) (reversing conviction because defense counsel was not allowed to ask prospective jurors whether they would believe the testimony of a complaining witness in a sexual assault trial merely because she said someone had tried to rape her). Allowing prospective jurors to hear some of the facts of the case before or during voir dire is consistent with CrR 6.4(b), which provides that "[t]he judge shall initiate the voir dire examination by identifying the parties and their respective counsel and *by briefly outlining the nature of the case*." (Emphasis added.)

"Stake-out" questions. Questions that seek to have jurors commit themselves to a particular course of action or that are designed to indoctrinate jurors are *not* allowed during voir

dire, of course. These questions must be distinguished from permissible case-specific questions that directed at determining jurors' ability to follow to the law and/or their willingness to be impartial. The court in *Johnson*, 366 F. Supp. 845 recognized the difficulty in drawing a clear line between permissible "case-specific" questions and impermissible "stake-out" questions, but suggested that three factors should be considered: 1) whether the question asks a juror to "speculate or pre-commit" to how he or she might vote based on particular facts, 2) whether the question seeks to "discover in advance" what a jurors decision will be "under a certain state of the evidence" and 3) whether the question seeks to "indoctrinate [jurors] regarding potential issues." As the court in *Johnson*, 366 F. Supp. 2d at 849, pointed out, lawyers conducting voir dire can ask case-specific questions by prefacing any facts with "If the evidence shows…," and can avoid asking jurors to speculate about what their verdict should be by farming the question in terms of whether or not the prospective jury "could fairly consider" the evidence.

B. Cases Involving Race Require Thorough Written and Oral Voir Dire, Even When It Departs from "Tradition."

The Washington State Supreme Court has recognized that "injustices faced by black Americans are not relics of the past." Stephens, J. et. al, Letter to Members of the Judiciary and the Legal Community, The Supreme Court, State of Washington, June 4, 2020. "We continue to see racialized policing and the overrepresentation of black Americans in every state of court criminal and juvenile justice systems." Id.

The Court goes on to state, "Too often in the legal profession, we feel bound by tradition and the way things have "always" been." Id. The Court emphasizes that judges "can administer justice and support court rules in a way that brings greater racial justice to our system as a whole." Id.

Studies have shown that even White people who sincerely believe themselves to be nonprejudiced often harbor anti-Black sentiment that influences their behavior. Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know about Race and Juries - A Review of Social Science Theory and Research*, 78 Chi.-Kent. L. Rev. 997 (2003). People are frequently unable or unwilling to accurately predict how race will affect their judgments. *See, e.g.,* Richard E. Nisbett & Timothy DeCamp Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Processes,* 84 PSYCHOL. REV. 231 (1977). Race relevant voir dire questions can force jurors to think about their racial attitudes and about social norms against racial prejudice and institutional bias in the legal system, and may reverse the effects of implicit bias in jury decision making. Sommers & Ellsworth, 1027. Surfacing issues of bias during jury selection, including in questionnaires, helps jurors consciously guard against implicit bias. Peter A. Joy, *Race Matters in Jury Selection*, 109 Northwestern Univ. L. Rev. 180 (2015).

Here, the Court should not eliminate race conscious questions from a written questionnaire because it may be untraditional or controversial. This trial is taking place during a time when our community is examining racial bias, and the court should allow robust questions on the top of race both in the questionnaire and orally, so that prospective jurors may choose to expressing their views on this important topic in the way they are most comfortable.

C. <u>Because Evidence Of Bias May Be Circumstantial Or Revealed Indirectly, Parties Must Be Permitted To Employ Proven Means Of Detecting Latent Bias</u>

A for-cause removal of a potential juror does not require an admission by the juror of his or her actual bias. Instead, the court may make the determination upon circumstantial evidence and the potential for substantial emotional involvement. *See U.S. v. Allsup*, 566 F.2d 68, 71 (9th Cir., 1977). In *U.S. v. Allsup*, the 9th Circuit recognized that bias may exist even when the juror

does not admit it. The court explained "that men will be prone to favor that side of a cause with which they identify themselves either economically, socially, or emotionally is a fundamental fact of human character." *U.S. v. Allsup*, 566 F.2d at 71. As a result, in *Allsup*, the court

concluded it was error to not exclude from a bank robbery case two jurors who worked at banks. *Id*. The court concluded that the "potential for substantial emotional involvement, adversely affecting impartiality" required for cause removal. *Id.*

The Washington Court of Appeals instructs "[i]t is a good rule for the trial judge to honor challenges for cause whenever he may reasonably suspect that circumstances outside the evidence may create bias or an appearance of bias on the part of the challenged juror." *City of Cheney v. Grunewald*, 55 Wash.App. 807, 810 (1989).

Voir dire must also provide adequate time for individual questioning into areas of potential bias. A juror's silence, or even agreement, during group questioning is no substitute for individual questioning. *State v. Guevara Diaz*, 456 P.3d 869, 878 (Wash. Ct. App. 2020) (citing *State v. Irby*, 187 Wash. App. 183, 196, 347 P. 3d 1103 (2015); *Hughes v. United States*, 258 F.3d 453, 461 (6th Cir. 2001)).

Even when individually questioned, a juror's one-word affirmative answers in response to rehabilitative questions should not be relied upon as evidence that they can be fair and impartial. *See City of Cheney v. Grunewald*, 55 Wn. App. 807, 811 (1989). *Grunewald* stands for the proposition that a juror should be excused for cause despite his or her providing positive responses to the typical litany of "rehabilitative" questions posed by prosecutors. In *Grunewald*, the following exchange took place:

THE COURT: ... do you think you can put all that aside and give both parties here a fair trial?
MR. BAUMAN: I do.
THE COURT: ... Do you understand that it's not illegal to drink and drive.
MR. BAUMAN: I do.
THE COURT: Do you think that you can keep a fair and open mind throughout that entire trial?
MR. BAUMAN: Yes.

When questioned by defense counsel, the following:

MR. IRWIN: Okay, ... do you think that you would have any problem withholding forming that same type of opinion until both sides are in this trial.
MR. BAUMAN: I don't think so.
MR. IRWIN: For instance, if the officer gets up on the stand and says that Roy was intoxicated while driving are you pretty much going to close your mind at that point?
MR. BAUMAN: No.
After questioning Mr. Bauman about his relationship to his sister-in-law and his association with M.A.D.D., defense counsel asked:
MR. IRWIN: And you don't feel that any of this would affect your ability to be objective in this type of case?
MR. BAUMAN: I don't think so, no.
MR. IRWIN: ... Do you think Roy's done anything wrong because he's here today?
MR. BAUMAN: I don't know that's to be decided today?
MR. IRWIN: Do you think the fact that a person is charged indicates guilt?
MR. BAUMAN: Um, no, not really, not until we hear all the evidence and then go through the process.
MR. IRWIN: Do you think that you would be inclined to side with the police officer early on in the trial and by doing so you would be furthering the goals of M.A.D.D.?
MR. BAUMAN: No, no I don't think I could divorce (unclear).
MR. IRWIN: If you were in Roy's place today, would you want six jurors with your frame of mind? Would you feel that he would get a fair trial with six jurors with your frame of mind right now?
MR. BAUMAN: I don't think so.

City of Cheney v. Grunewald, 55 Wash. App. 807, 808-09 (1989).

Despite the juror's repeated affirmation of no bias, the court held that the juror's affiliation with MADD and the fact his niece was killed by a drunk driver, coupled with the answer that he would not want six jurors with his frame of mind on the jury if he were in Mr. Grunewald's position and that he would not receive a fair trial with six such jurors, sufficient

actual bias was demonstrated to justify his removal for cause. *City of Cheney v. Grunewald*, 55 Wash. App. at 811. The Supreme Court reversed the conviction because this juror should have been stricken for cause, as his statement evidenced an inability to try the DUI case fairly. This line of questioning was also approved in *State v. Noltie*, 116 Wn.2d 831, 836-40 (1991), where the juror responded negatively when asked if she would want a person like her on the jury if she were the accused.

In *State v. Fire*, 100 Wn. App. 722, 728–29, 998 P.2d 362 (2000), *rev'd on other grounds*, 145 Wn.2d 152 (2001), the Court held that a juror's admission that "it was possible that his strong feelings about this kind of case [involving a sex assault on a child] could affect his determination of guilt or innocence" was an indication of actual bias. The juror had said that he would "probably give children a higher credibility factor than adults." *Id.* The prosecutor attempted to rehabilitate the juror by asking the juror

> PROSECUTOR: And you - if you were given instructions on what that means and the other instructions, you would follow the instructions as given to you by the Court?
>
> JUROR: Yes.
>
> PROSECUTOR: But you do have some strong feelings about the case, but you'd still follow the law?
>
> JUROR: Yes.

Id. at 724. This attempt to rehabilitate the jury was inadequate. The Court of Appeals held that the juror should have been stricken despite his promises to be fair. The court, like the court in *Grunewald*, was not persuaded by the juror's positive responses to the prosecutor's rehabilitative questions. The Court stated, "[j]ust as most potential jurors will not respond affirmatively if asked, 'Are you biased?' few will fail to respond affirmatively to a leading question asking whether they can be fair and follow instructions." *Id*. (citations omitted). The

court explained: "We find nothing in the potential **juror's one-word affirmative responses to the mantra of rehabilitative questions** that indicates he had come to understand that he must lay his preconceived notions aside, in order to serve as a fair and impartial juror." *Fire,* at 728 (emphasis added).

In this case, allowing questions in the questionnaire about race, as proposed by the defense, will allow jurors another forum other than oral questioning to examine their opinions on race and violence, race and sexual assault, and race and police investigations. The hope is that allowing jurors multiple ways to express their views will guard against implicit bias and result in a fair and impartial jury.

II. The Court Must Grant Appropriate GR 37 Challenges

A. The Court Must Deny a Peremptory Challenge Whenever an Objective Observer Could View Race or Ethnicity as a Factor

The Washington Supreme Court enacted GR 37 in 2018 to "eliminate the unfair exclusion of potential jurors based on race or ethnicity." GR 37(a). Under GR 37, a peremptory challenge cannot be granted if "an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge." GR 37(e) (emphasis supplied). The court rule expands the federal standard articulated in Batson by not requiring "purposeful discrimination" before denying the challenge. GR 37(e).

Racially discriminatory jury selection is violative of the equal protection guarantee of the Fourteenth Amendment. Jefferson, 192 Wn.2d at 239; U.S. Const. amend. XI. "A person's race simply is unrelated to his fitness as a juror." *Batson*, 476 U.S. at 87 (internal quotation marks and citation omitted); *see also State v. Lupastean*, 200 Wn.2d 26, 34, 513 P.3d 781 (2022) ("peremptory challenges can never be exercised on the basis of race"). Such discrimination

harms not just the defendant by violating his right to a fair and impartial jury, but also harms the excluded juror and the broader community, undermining confidence in the fairness of the proceeding. *Miller-El v. Dretke*, 545 U.S. 231, 237-38, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005). Moreover, "when the State discriminates in jury selection, 'the threat to the accuracy of the trial is significant and unacceptable,'" *In re Pers. Restraint of Rhone*, 23 Wn. App. 2d 307, 329, 516 P.3d 401 (2022). *See also Jefferson*, 192 Wn.2d at 229 ("We need to do better to achieve the objectives of protecting litigants' rights to equal protection of the laws and jurors' rights to participate in jury service free from racial discrimination." (emphasis supplied) (footnote omitted)).

The Equal Protection Clause prohibits a prosecutor from using the State's peremptory challenges to exclude otherwise qualified and unbiased persons from the jury solely by reason of their race, a practice that forecloses a significant opportunity to participate in civic life. *Powers v. Ohio*, 499 U.S. 400, 409, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991). An individual juror does not have a right to sit on any particular jury, but he or she does possess the right not to be excluded from one on account of race. *Id*. *Powers* applied to a peremptory challenge of a juror of a race different from that of a defendant. *Id*. The Court found that "to bar petitioner's claim because his race differs from that of the excluded jurors would be to condone the arbitrary exclusion of citizens from the duty, honor, and privilege of jury service." *Id.* at 415.

Once a GR 37 based objection is lodged, the party exercising the challenge must disclose the reasons therefore. GR 37(d). The trial court's subsequent evaluation of the challenge, which must be explained on the record, rests on whether or not an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge. GR 37(e).

An objective observer, for purposes of GR 37, is "aware of the history of explicit race discrimination in America and aware of how that impacts our current decision making in nonexplicit, or implicit, unstated, ways." GR 37(f). GR 37's objective observer views the challenge from the standpoint of an "average, reasonable person." *State v. Jefferson*, 192 Wn.2d 225, 249-50, 429 P.3d 467 (2018).

In evaluating the challenge, the Court must determine whether the reasons given include "presumptively invalid" reasons or conduct that have historically been "associated with improper discrimination in jury selection in Washington State." GR 37(h). The relevant reasons and conduct include,

- having prior contact with law enforcement officers
- expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling
- having a close relationship with people who have been stopped, arrested, or convicted of a crime
- living in a high-crime neighborhood
- having a child outside of marriage
- receiving state benefits
- not being a native English speaker
- sleeping, inattentive, or staring or failing to make eye contact
- problematic attitude, body language, or demeanor
- unintelligent or confused answers

GR 37(h), (i); *State v. Orozco*, 19 Wn. App. 2d 367, 377, 496 P.3d 1215 (2021). Moreover, any party citing the conduct in GR 37(i) as justification for their peremptory challenge must "provide reasonable notice to the court and the other parties so the behavior can be verified and addressed in a timely manner." GR 37(i).

Race need only be "a" factor in the application of GR 37 to a peremptory challenge. "Combining a race-neutral justification with a presumptively invalid one is not 'race neutral.'"

Orozco, 19 Wn. App. 2d at 377. The trial court's application of GR 37 is reviewed de novo. *State v. Omar*, 12 Wn. App. 2d 747, 751, 460 P.3d 225 (2020).

B. GR 37 Protects Prospective Jurors of Every Race from Discriminatory Exclusion

The Equal Protection Clause does not protect only the rights of persons of color. "The guarantees of the Fourteenth Amendment extend to all persons." *Regents of University of California v. Bakke*, 438 U.S. 265, 289, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978). "It applies equally to whites and minorities and does not provide greater protection to one group than another. Id. at 295.

The state Supreme Court has charged courts under its jurisdiction with interpreting court rules so as not to violate a defendant's constitutional rights. CrR 1.1 ("These rules shall not be construed to affect or derogate from the constitutional rights of any defendant.) The interpretation of GR 37 as applying only to the race-based exclusion of jurors of color violates the plain language of this edict. *Id*.; *State v. Berry*, 31 Wn. App. 408, 410-11, 641 P.2d 1213 (1982).

Neither case law nor the language of GR 37 limit the application of the rule to jurors of any particular race. *State v. Walton*, 542 P.3d 1041(2024). To the contrary, both the rule and case law establish that allowing a peremptory challenge of a juror with a demonstrated understanding of racial issues without adequate race-neutral reasons is contrary to the express language and intent of GR 37. *Id*.

The plain language of GR 37 prohibits peremptory challenges where "an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge." GR 37(e). When a peremptory challenge is used to excuse a juror based on their understanding of

racial bias and concerns over representation, race is undoubtedly a factor in the challenge. A white juror's views on racial justice, including implicit understanding of racial bias and systemic racism, are part and parcel of excluding a juror based on "race or ethnicity." There is no limiting instruction in the rule; it can serve to *both* increase the participation in trials of jurors of color *and* ensure that defendants of color are not disenfranchised by juries ignorant of racial challenges.

The Court has found that a GR37 challenge was appropriate where a white juror expressed distrust of law enforcement based on concerns about racism and policing. *Walton, supra.* The Court has also found that a GR 37 challenge was appropriate where a white-appearing juror was ousted from an all-white jury through a peremptory challenge after expressing "mindfulness of the Black Lives Matter movement and media coverage on racial justice issues," in the trial of a Black defendant. *State v. Harrison*, 528 P.3d 849 (2023). Although the State's proffered reason for exclusion of this juror was a claim that the juror expressed uncertainty over their ability to be impartial, the Court found the State's argument that this was the sole reason for the challenge, "specious in light of the totality of the circumstances." *Id.* at 853. None of the jurors had answered when asked if they could *not* provide a fair trial, and that the State had also chosen to strike via peremptory challenge the only other two jurors who had a demonstrated awareness of racial justice, in a trial against a Black defendant. *Id.* The Court found that a racially biased reason for the challenge was implicated under the circumstances, reasoning that the "presumption of invalidity is not overcome merely because the State used different language when giving its reasons for using its challenge." *Id, citing State v. Tesfasilasye*, 200 Wn.2d 345, 359, 518 P.3d 193 (2022).

As Judge Linda Lee observed in her concurrence to *Harrison,*

> Nothing in GR 37 or any related rule states that courts should consider only the prospective juror's race or that the prospective juror must be a racial or ethnic minority for GR 37 to apply to them. Because we must not add words to court rules where the drafter chose to not include them, **we should not limit the GR 37 consideration of race or ethnicity to only the prospective juror's race or ethnicity.** Rather, GR 37's plain language provides that courts must consider the totality of the circumstances. GR 37(e). The totality of the circumstances includes the defendant's race or ethnicity, not just the prospective juror's race or ethnicity.
>
> GR 37's plain language requires courts to view peremptory challenges with an awareness of institutional biases. GR 37(e), (f). It is clear that our criminal legal system perpetuates institutional biases against defendants who are racial or ethnic minorities, not just jurors. With these institutional biases in mind, **we should hold that GR 37 requires courts to deny a peremptory challenge if an objective observer could, in light of the totality of the circumstances, view *the defendant's* race or ethnicity as a factor in the use of that peremptory challenge.** This interpretation is admittedly unconventional, but it reflects the plain language and ordinary meaning of GR 37.

Harrison, 528 P.3d at 854-5, (Judge Linda Lee, concurring)(emphasis supplied, internal citations omitted).

C. <u>If a Juror Exhibits Actual or Implied Bias, an Objective Observer Could Not View Race or Ethnicity as a Factor in the Use of a Peremptory Challenge</u>.

The accused has a federal and state constitutional right to be tried by a fair and impartial jury. *State v. Slert*, 186 Wash.2d 869, 877 (2016). Trial judges have an independent duty to protect that right by excusing jurors "who have actual or implied bias." *Id*. Jurors may be dismissed for cause based on actual bias if their views would " 'prevent or substantially impair the performance of [their] duties as [jurors] in accordance with [their] instructions and [their] oath.' *State v. Brett*, 126 Wash.2d 136, 157 (1995) (internal quotation marks omitted) (*quoting State v. Hughes*, 106 Wash.2d 176, 181 (1986)). "Actual bias" is defined by statute as "the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging." RCW 4.44.170(2). Therefore,

where a challenged juror has displayed implied or actual bias against the defendant, even if a for-cause challenge was not successful, an objective observer could not view race or ethnicity as a factor in the use of a peremptory challenge.

Respectfully submitted this ___ day of _____ 202_.

_____

ATTORNEY FOR MR./MS. _____